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Pubalan a/l Peremal v Public Prosecutor

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FEDERAL COURT (PUTRAJAYA) — CRIMINAL APPEAL NO 05(M)-118–05 OF 2018(B)
ROHANA YUSUF PCA, AZAHAR MOHAMED CJ (MALAYA), ABANG ISKANDAR CJ (SABAH AND SARAWAK), NALLINI PATHMANATHAN, VERNON ONG, ABDUL RAHMAN SEBLI, ZALEHA YUSOF, ZABARIAH MOHD AND HASNAH HASHIM FCJJ
13 AUGUST 2020

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Criminal Law — Murder — Evidence — Whether testimony of forensic pathologist who conducted post-mortem on deceased was insufficient to support murder conviction — Whether pathologist merely said death was caused by 'multiple incised wounds' without describing nature of and likely and natural effects of those wounds — Whether prosecution at trial should have questioned pathologist on his opinion of the nature of the injuries and its likely and natural effects — Whether without such expert opinion evidence trial court would not be in position to convict accused for murder given the technical differences between what constituted murder and what amounted to only culpable homicide under ss 299 and 300 of the Penal Code

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The appellant was convicted and sentenced to death by the High Court for murdering his brother-in-law ('the deceased'). The Court of Appeal ('COA') upheld the conviction and sentence. In the instant appeal against the COA's decision, the appellant submitted that the evidence of a forensic pathologist ('PW4') called by the prosecution at the trial could not support the charge of murder. The prosecution's evidence was that several hours after the appellant had a quarrel with three of his brothers-in-law, including the deceased, he had stabbed the deceased with a sharp object. Three witnesses testified that when they found the deceased lying in a pool of blood, he was still conscious and able to talk and had reportedly told them it was the appellant who had stabbed him. PW4's post-mortem report on the deceased merely stated that there were 19 incised wounds on the body and that the death was caused by 'multiple incised wounds'. The appellant's counsel contended that PW4's evidence was 'very sketchy' and failed to sufficiently describe the nature of, and the 'likely and natural effects' of, the injuries sustained by the deceased. Counsel submitted that PW4's evidence did not say that the wounds sustained by the deceased were sufficient in the ordinary course of nature to cause death. This was necessary to show the degree of the appellant's mens rea; whether he had the intention to cause death or injuries that he knew were likely to cause death. Counsel argued that if there was more than one inference which could reasonably be drawn from a set of facts, the one most favourable to the accused

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should be adopted. Counsel submitted that the trial judge's failure to discuss the degree of the appellant's mens rea vis a vis the relevant limbs of s 300 of the Penal Code was a serious misdirection that warranted the murder conviction to be set aside and substituted with a conviction for culpable homicide not amounting to murder under the first part of s 304 of the Penal Code.

Held, unanimously setting aside the murder conviction, convicting the appellant under s 304(a) of the Penal Code and sentencing him to 15 years' jail:

(1) According to the post-mortem pathologist's report, there were altogether 19 incised wounds on the deceased's body though none of them were described to be fatal wounds. The post-mortem report only stated that the cause of death was 'multiple incised wounds'. In view of the nature of the injuries and the time and place of the incident, there was intention on the part of the appellant to cause bodily injury to the deceased. In the light of such evidence, it was important for the trial judge to have appreciated the distinction between the definitions of culpable homicide and murder under ss 299–300 of the Penal Code before deciding which offence to convict the appellant for (see para 18).

(2) In the particular circumstances of the case, the important question that had to be determined — but which remained unanswered — was whether the appellant intended to cause such bodily injuries as he knew were likely to cause death or such as was sufficient in the ordinary course of nature to cause death. PW4 should have been asked to give his opinion on the nature of the injuries and its likely and natural effects but he was not asked any questions on this crucial point. Since the evidence in this respect was wanting, the appellant should have been convicted for committing culpable homicide by causing such bodily injury as was likely to cause death, and not for murder (see para 19).

(3) The outcome of a prosecution on a charge of murder did not turn solely on the testimony of the forensic pathologist. The forensic pathologist did not carry the burden of the case. His testimony was a factual and objective presentation of his autopsy findings and his opinion on the co-relation of the autopsy findings with other information on the case. Even though he was called by the prosecution to testify, he was first and foremost an expert witness who should be impartial, objective and independent. In the final analysis, whether the appellant intended to cause such bodily injuries as he knew were likely to cause death or were such as were sufficient in the ordinary course of nature to cause death so as to constitute the offence of murder, were questions which should have been asked of the forensic pathologist by the prosecution during the trial (see para 20).

[Bahasa Malaysia summary

Perayu telah disabitkan dan dihukum mati oleh Mahkamah Tinggi kerana membunuh abang iparnya ('si mati'). Mahkamah Rayuan ('MR') telah mengekalkan sabitan dan hukuman. Dalam rayuan ini terhadap keputusan MR, perayu berhujah bahawa keterangan ahli patologi forensik ('PW4') yang dipanggil oleh pendakwaan semasa perbicaraan tidak dapat menyokong pertuduhan pembunuhan itu. Keterangan pendakwaan adalah bahawa beberapa jam selepas perayu bertengkar dengan tiga abang iparnya, termasuk si mati, dia telah menikam si mati dengan objek tajam. Tiga saksi telah memberi keterangan bahawa apabila mereka menjumpai si mati terbaring berlumuran darah, dia masih sedar dan mampu bercakap dan sebagaimana dilaporkan telah memberitahu mereka yang perayu telah menikamnya. Laporan bedah siasat PW4 berhubung si mati hanya menyatakan bahawa terdapat 19 luka bertakuk pada badan dan bahawa kematian telah disebabkan oleh 'multiple incised wounds'. Peguam perayu menegaskan bahawa keterangan PW4 adalah 'very sketchy' dan gagal menggambarkan secukupnya tentang sifat, dan 'likely and natural effects' kecederaan yang dialami oleh di mati. Peguam berhujah bahawa keterangan PW4 tidak mengatakan bahawa luka yang dialami oleh di mati mencukupi dalam sifat semula jadi yang menyebabkan kematian. Ini adalah perlu untuk menunjukkan tahap mens rea perayu; sama ada dia mempunyai niat untuk menyebabkan kematian atau kecederaan yang diketahuinya berkemungkinan boleh menyebabkan kematian. Peguam berhujah bahawa jika terdapat lebih daripada satu inferens yang boleh secara munasabah dibuat daripada set fakta, yang paling berpihak kepada tertuduh patut diguna pakai. Peguam berhujah bahawa kegagalan hakim perbicaraan untuk berbincang tentang tahap mens rea perayu vis a vis cabang s 300 Kanun Keseksaan yang relevan adalah satu salah arah yang serius yang mewajarkan sabitan pembunuhan diketepikan dan digantikan dengan sabitan kesalahan mematikan orang dengan salah yang tidak terjumlah kepada kesalahan membunuh orang di bawah bahagian pertama s 305 Kanun Keseksaan.

Diputuskan, sebulat suara mengetepikan sabitan pembunuhan, mensabitkan perayu di bawah s 304(a) Kanun Keseksaan dan menjatuhkan hukuman penjara selama 15 tahun ke atasnya:

(1) Menurut laporan bedah siasat ahli patologi, terdapat 19 luka bertakuk pada badan si mati meskipun tiada antaranya digambarkan sebagai luka yang memudaratkan. Laporan bedah siasat itu hanya menyatakan bahawa sebab kematian adalah 'multiple incised wounds'. Mengikut sifat kecederan dan masa dan tempat kejadian, terdapat niat di pihak perayu kerana menyebabkan kecederaan badan kepada si mati. Berdasarkan keterangan, ia adalah penting untuk perbicaraan hakim bicara untuk memahami perbezaan antara tafsiran kesalahan mematikan orang dengan salah dan pembunuhan di bawah ss 299–300 Kanun Keseksaan

A sebelum memutuskan kesalahan mana untuk mensabitkan perayu (lihat perenggan 18).

(2) Dalam keadaan tertentu kes, persoalan penting yang perlu ditentukan — tetapi yang masih tidak berjawab — adalah sama ada perayu mempunyai niat untuk menyebabkan kecederaan badan tersebut kerana dia mengetahui berkemungkinan menyebabkan kematian atau adalah mencukupi dalam sifat semulajadi menyebabkan kematian. PW4 patut diminta untuk memberikan pendapatnya berhubung sifat kecederaan itu dan kemungkinannya dan kesan semulajadinya tetapi dia tidak ditanya apa-apa persoalan berhubung isu penting ini. Oleh kerana keterangan berkenaan ini mewajarkannya, perayu patut disabitkan kerana melakukan kesalahan mematikan orang dengan salah dengan menyebabkan kecederaan badan kerana ia berkemungkinan menyebabkan kematian, dan bukan kerana pembunuhan (lihat perenggan 19).

(3) Hasil pendakwaan berhubung pendakwaan pembunuhan tidak terarah semata-mata pada keterangan ahli patologi forensik. Ahli patologi forensik tidak membawa beban kes. Keterangannya adalah pembentangan fakta dan tujuan penemuan autopsy dan pendapatnya berhubung penemuan autopsy yang sama berkaitan dengan maklumat lain berhubung kes itu. Walaupun dia telah dipanggil oleh pendakwaan untuk memberi keterangan, dia adalah saksi pakar yang pertama dan terpenting yang sepatutnya tidak berat sebelah bertujuan dan bebas. Dalam analisis akhir, sama ada perayu berniat untuk menyebabkan kecederaan badan kerana dia mengetahui berkemungkinan menyebabkan kematian atau yang mencukupi dalam sifat semulajadi menyebabkan kematian sehingga merupakan kesalahan pembunuhan, adalah persoalan yang patut disoal kepada ahli patologi oleh pendakwaan semasa perbicaraan (lihat perenggan 20).]

Cases referred to

Cheong Kam Kuen v PP [2013] 1 MLJ 15; [2013] 2 MLRA 1, FC (refd)
Tham Kai Yau & Ors v PP [1977] 1 MLJ 174, FC (refd)

Legislation referred to

Penal Code ss 299, 300, 300(a), (b), (c), (d), 302, 304
Rules of Court 2012 O 40A r 2(1), (2)

Appeal from: Criminal Appeal No B-05-(M)-443–12 of 2016 (Court of Appeal, Putrajaya)

Editorial Note: Please refer to *Letitia Bosman v Public Prosecutor and other appeals (No 1)* [2020] 5 MLJ 277 for the decision on the issue of the constitutionality of the death sentence.

Gopal Sri Ram (Hisyam Abdullah, Abdul Rashid Ismail, Yasmeen Soh Sha Nisse, Karluis Quek, Azreen Ahmad Rastom, Siti Nurani Md Zahidi and Mohd Nor Hafidzuddin Yusoff with him) (Rashid Zulkifli) for the appellants.

Nik Suhaimi bin Nik Sulaiman (Umar Saifuddin Jaafar, Mangaiarkarasi Krishnan, Faizah Salleh, Ku Hayati Ku Haron, Asmah Musa and Muhammad Azmi Mashud with him) (Attorney General's Chambers) for the respondent.

Vernon Ong FCJ:

INTRODUCTION

[1] The appellant was charged with murder under s 302 of the Penal Code. After a full trial at the High Court and hearing of 24 prosecution witnesses and three defence witnesses, the appellant was convicted on that charge and sentenced to death. The appellant's appeal to the Court of Appeal against the conviction and sentence was dismissed. This is the unanimous judgment of this court and it deals with the appeal against conviction and sentence. It does not deal with the question of the unconstitutionality of the mandatory death sentence prescribed under s 302 of the Penal Code. The constitutional point will be taken up in the separate written judgments of my learned brother Azahar Mohamed CJM and of my learned sister Nallini Pathmanathan FCJ.

[2] The incident giving rise to this case took place at between 12 noon and 1pm on 4 November 2013 at house No 7, Jalan Timah 1, Taman Timah 1, 4300 Dengkil, Selangor. The house in question was occupied by the appellant and his family together with two brothers in law, one Manmathan a/l Doraisamy ('PW10') and Murali a/l Doraisamy (the deceased). The appellant's wife one Kalaiselvi a/p Doraisamy ('PW18') is the elder sibling of the deceased. One day before that date coinciding with the second day of Deepavali, the appellant planned to hold a gathering at his house to celebrate Deepavali with his workmates. To that intent, the appellant's workmates came to the house to set up the tent and make preparations for the gathering. The preparations were disrupted by the appellant's brothers in law (one Murthi a/l Doraisamy ('PW9'), PW10, and the deceased) and their aunties because they objected to the same. The appellant alleged that PW9 and PW10 assaulted him. However, notwithstanding the disruption the party proceeded and ended at 2am on 4 November 2013. With that background showing the estranged relationship between the appellant and his brothers in law, it is alleged by the prosecution that the appellant attacked the deceased with a sharp object.

[3] Later that day at about 1.02pm, PW9 received a phone call from the appellant informing that he had stabbed the deceased. PW9 subsequently contacted his cousin one Kanakaraaju a/l Ayer ('PW14') and asked him to check on the deceased's condition at the appellant's house. On arrival, PW14

found the deceased lying in a pool of blood on the floor in a room on the upper floor of the house. PW14 then made a police report at the Balai Polis Dengkil and called for an ambulance.

[4] Meanwhile, PW10 after being informed of the incident by the appellant's wife PW18, went to the house together with one Pandiyan. They found the deceased in a conscious state and able to talk. In response to PW10's questions as to who assaulted him, the deceased said that it was the appellant alone that did it. Two other witnesses, one Kalaivanan a/l Nadarajah ('PW19') and one Gunentren a/l Pandiyan ('PW17') who subsequently came on the scene also heard the deceased uttered the appellant's name when the deceased was asked what happened.

[5] The deceased was brought to the Putrajaya Hospital and pronounced dead at 1.45pm on 4 November 2013. According to a post mortem examination of the deceased conducted by Dr Siew Sheue Feng ('PW4') a forensic medicine specialist ('the pathologist') on 5 November 2013, there were 19 incised wounds on the body of the deceased. The pathologist testified that in his opinion the cause of death was 'Multiple Incised Wounds'.

SUBMISSIONS

[6] The appeal against conviction was brought on one principal ground and it is this: that there were infirmities in the evidence of the pathologist in that the evidence of the pathologist was lacking. Learned counsel for the appellant argued that the conviction under the third limb of s 300 of the Penal Code could not be supported by the evidence adduced by PW4's evidence. Firstly, PW4's witness statement is essentially a combination of the expert evidence of PW4 and a reproduction of the post-mortem report. Both the witness statement and the post-mortem report concluded that the cause of death was 'Multiple incised wounds'. PW4 did not describe 'the likely and natural effects' of the injuries. Secondly, PW4's oral evidence is very sketchy. During examination-in-chief, PW4 was asked 'From the injuries sustain … have any survival chances for the deceased?' to which PW4 answered 'No'. However, in cross-examination SP4's answers contradicted what he said in examination-in-chief:

> Q: There no wound that is … in major part of the body?
>
> A: Yes.
>
> Q: Not wound to cause death of this person?
>
> A: This wound more to defence wound.

[7] Learned counsel argued that PW4 did not say that the wounds would

cause the death of the deceased, contradicting his earlier evidence in examination-in-chief about the chances of survival. As a whole, PW4's evidence was skimpy, sketchy and devoid of any further elaboration because the learned DPP did not ask any questions in re-examination of PW4. As such, the learned trial judge erred when he failed to appreciate that part of PW4's evidence which did not say that the wounds would cause death. That part of the evidence of PW4 is relevant to show the degree of mens rea, whether the appellant had the necessary intention to cause death or injuries.

[8] Accordingly, learned counsel submitted that the infirmity of PW4's evidence with regard to the prosecution's case is compounded by the fact that there was no evidence from PW4 on the nature of the injuries and its likely and natural effects, citing *Tham Kai Yau & Ors v Public Prosecutor* [1977] 1 MLJ 174 (FC) in support. There was no evidence by PW4 to say that the injuries were sufficient in the ordinary course of nature to cause death.

[9] Learned counsel also argued that the need to address the degree of mens rea will inevitably bring into focus the differences between ss 299 and 300 of the Penal Code, which point was underscored in the recent judgment of this court in *Cheong Kam Kuen v Public Prosecutor* [2013] 1 MLJ 15; [2013] 2 MLRA 1 (FC) which judgment opined that on the question whether the appellants intended to cause such bodily injuries as they knew to be likely to cause death or such as is sufficient in the ordinary course of nature to cause death, the medical witness should have been asked to give his opinion on the nature of the injuries and its likely and natural effects. As such, the failure of the learned trial judge to discuss on the degree of mens rea and the relevant limbs of s 300 is a serious misdirection. Accordingly, it was submitted that the murder conviction ought to be set aside and substituted with one of culpable homicide falling under the first part of s 304 of the Penal Code.

[10] In reply, learned deputy public prosecutor ('DPP') argued that there was ample and sufficient evidence through PW4 to show that the injuries inflicted on the deceased caused the death of the deceased. PW4 testified that in his opinion the cause of death was multiple incised wounds; of which there were altogether 19 deep incised wounds on the deceased. PW4 also testified that from the injuries sustained there were no chances for survival for the deceased. Learned DPP also argued that *Tham Kai Yau*, is distinguishable as it dealt with the four cases (paras (a)–(d)) under s 300 whereas in this case, the prosecution was relying on only the third case (para (c)) under s 300. Learned DPP conceded that even though there was no direct evidence as to which incised wound caused death, the nature of the injuries inflicted on the deceased can be taken to be sufficient in the ordinary course of nature to have caused the death of the deceased. At any rate, there was no miscarriage of justice and the conviction is safe and appellate intervention is not warranted.

A ROLE OF A FORENSIC PATHOLOGIST

[11] The main thrust of the appellant's argument relates to the infirmities of the evidence of PW4, the forensic pathologist. We think that it is important to revisit the role of a forensic pathologist as an expert witness, especially in the context of a criminal trial. Put simply, an expert witness is a person whose level of specialised knowledge or skill in a particular field qualifies him to present his opinion about the facts of a case during legal proceedings. An expert witness's overriding duty is to provide independent, impartial, and unbiased evidence to the court. The fact that the expert witness is called by one party does not detract from the overriding duty to the court. It is the duty of an expert witness to assist the court on the matters within his expertise. This duty overrides any obligation to the person from whom he has received instructions or by whom he is paid: see O 40A r 2(1) and (2) of the Rules of Court 2012.

[12] In a book entitled *Forensic Pathology, Principles and Practice* (Elsevier Academic Press, 2005) co-authors David Dolinak MD, Evan W Matshes, MD, and Emma O Lew, MD presented an illuminating overview of the role of a forensic pathologist. Their observations may be distilled as follows:

(a) the forensic pathologist should understand what his role is in the legal process before providing testimony. As a competent and acute observer in the laboratory he testifies as to his factual findings and opinions in a clear, straightforward, unbiased, and professional manner;

(b) the 'testimony' actually begins in the autopsy room where the anatomic studies are conducted to his professional satisfaction. At this time, the forensic pathologist must recognise, collect, and preserve medical evidence and prepare a report of such findings for possible future testimony;

(c) on the stand, the forensic pathologist does not simply testify as to cause and manner of death. Much of the forensic pathologist's testimony revolves around autopsy findings and the correlation of the autopsy findings with other case information. This requires expanding the case file and one's critical review of the information to the fullest. This may involve ancillary information collected to enhance findings and support conclusions;

(d) the forensic pathologist interprets how a death came about and may be questioned on various aspects of the death such as what type of instrument may have been used to inflict the injury, and how long an injured individual may have been dead until he was found. The forensic pathologist's observations must be of high professional caliber and be thoroughly and well documented;

(e) there are two key features of sound medical testimony: (i) scientific validity; and (ii) personal impartiality. As for scientific validity, the forensic pathologist is to restrict his testimony to facts objectively noted, analysed in detail, and accurately recorded, and to opinions solidly derived from these data. The forensic pathologist's observations must be of high professional caliber and be thoroughly and well documented. Regarding personal impartiality, the forensic pathologist, although usually called to testify by the prosecution, must give fair and dispassionate testimony and must not permit himself to become a prosecuting witness. His testimony must not be 'prosecution minded' or 'defense minded,' for he is not testifying for or against either party. The goal is to present the truth as he sees it, willingly and unemotionally doing what is possible within the bounds of unbiased and disinterested observations to help the court reach a just decision;

(f) the value of the most competently performed autopsy is diminished in the courtroom if the information derived from it is presented by a poor witness: one who mumbles, argues with counsel, or commits a number of other violations of good and proper testimony;

(g) the forensic pathologist's opinion must never be biased for or against the prosecution or defence. It is a factual presentation of evidence collected during the course of an entire death investigation; and

(h) the forensic pathologist does not win or lose a case. Although the anatomic findings and opinions are important and necessary, rarely do they alone permit the court to come up with an enlightened decision. So long as the forensic pathologist is mindful of his role, including what is expected of him, and knowing the limitations of what he can say, and 'knows that it is up to the attorneys to ask the appropriate questions to win or lose the case,' then the forensic pathologist as an expert witness, through experience, will become more comfortable in his role and provide effective, appropriate, and proper testimony.

[13] The importance about the independence and impartiality of the forensic pathologist as an expert witness was underscored in *Autopsy, The Memoirs of the World's Greatest Medical Detective*, Milton Helpern MD and Bernard Knight MD (Star, 1979) at pp 61–65:

> ... People often don't appreciate that an expert witness — or any witness, for that matter, isn't called to the stand to root for any particular side in the case. He's there to describe what he found and to offer his conclusion and interpretation based on all of those findings, whatever they may be. He is not there to win the case for one side or the other. If his conclusions were adverse to the prosecution or the defence, they would not have put him on the stand to testify in the first place — and if his medical opinion was all that adverse to the prosecution, then the case should never have gone as far as trial.

A So, the medical witness shouldn't be outrageously partisan, whatever side he is called for. We are sometimes accused of getting up on the stand and saying only whatever happens to suit the party that calls us — but people don't see the occasions when we've told our clients that what we have to say won't do them a damn bit of good — and maybe will do them a lot of harm; they don't see us then, because we don't get
B put on any stand.

DECISION

[14] In essence, the issue canvassed by learned counsel for the appellant
C relates to the question of what offence the appellant should have been convicted. The appellant's argument is premised on the ground that the learned trial judge failed to consider that where there is more than one inference which can reasonably be drawn from a set of facts, the inference most favourable to the appellant should be adopted.

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[15] In cases of personal violence resulting in death it is necessary for the trial judge to have directed his mind on the issue of degree of mens rea in the mind of the appellant. Whilst intention is a matter of inference, in actual practice it is frequently a matter of considerable difficulty to come at a conclusion by
E application of this principle because of the close proximity that the Penal Code makes between intention and knowledge. Admittedly, in the first place, the provisions relating to murder and culpable homicide are very technical. Apart from the distinction between intention and knowledge, the Penal Code also draws subtle distinctions between the degrees of intention to inflict bodily
F injury. Further, if after a thorough evaluation of the evidence the trial judge comes to the conclusion that the offence committed is not murder but culpable homicide, then it becomes necessary to determine whether the appellant should be convicted for culpable homicide under the first or second part of s 304 of the Penal Code.

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Distinction between ss 299 and 300 of the Penal Code

[16] We take the view that trial judges would do well to bear in mind the following passages on the important distinction between ss 299 and 300 of the
H Penal Code elucidated succinctly by Raja Azlan Shah FJ (as HRH then was) in *Tham Kai Yau* at p 176 of the report:

> Section 299 of the Penal Code enacts that a person commits culpable homicide, if the act by which the death is caused is done: (a) with the intention to cause death; (b) with the intention of causing such bodily injury as is *likely* to cause death;
I (c) with the knowledge that ... the act is *likely* to cause death.
>
> Section 300 of the Penal Code defines murder as follows. Except in the cases hereinafter excepted, culpable homicide is murder, if the act by which the death is caused is done: (1) with the intention of causing death; (2) with the intention of causing such bodily injury as the offender *knows to be likely* to cause the death of the

person to whom the harm is caused; (3) with the intention of causing such bodily injury to any person, and ... *is sufficient in the ordinary course of nature* to cause death; (4) with the knowledge that the act is *so imminently dangerous that it must in all probability cause death*, or such bodily injury as is likely to cause death.

The words I have italicised show the marked differences between the two offences. Where there is an intention to kill, as in (a) and (1). The offence is always murder. Where there is no intention to cause death or bodily injury, then (c) and (4) apply. Whether the offence is culpable homicide or murder depends on the degree of risk to human life. If death is a likely result, it is culpable homicide; if it is the most probable result, it is murder. Illustration (d) of s 300 of the Penal Code is a case of this description. Where the offender knows that the particular person injured is likely either from peculiarity of constitution, immature age, or other special circumstances, to be killed by an injury which would not ordinarily cause death, it is murder. Illustration (b) of s 300 of the Penal Code is a good example. The essence of (b) and (3) is this. It is culpable homicide if the bodily injury intended to be inflicted is likely to cause death; it is murder, if such injury is sufficient in the ordinary course of nature to cause death. Illustration (c) given in s 300 of the Penal Code is an example. It is on a comparison of these two limbs of s 299 and s 300 that the decision of doubtful cases as the present must generally depend. The distinction is fine, but noticeable. In the last analysis, it is a question of degree of probability.

A comparison that frequently arises in the application of ss 299 and 300 is the tenuous contention that s 299 is not a substantive offence and therefore an offence is either murder or culpable homicide according to whether or not one of the exception to s 300 apply, and if by reason of the absence of the necessary degree of mens rea an offence does not fall within s 300, it cannot be one of culpable homicide not amounting to murder punishable under s 304 of the Penal Code, but would amount to causing grievous hurt. In our view, the correct approach to the application of the two sections is this. Section 299 clearly defines the offence of culpable homicide. Culpable homicide may not amount to murder (a) where the evidence is sufficient to constitute murder, but one or more of the exceptions to s 300 of the Penal Code apply, and (b) where the necessary degree of mens rea specified in s 299 is present, but not the special degree of mens reareferred to in s 300 of the Penal Code. We would like in this connection to express the need to bear in mind that all cases falling within s 300 of the Penal Code must necessarily fall within s 299, but all cases falling within s 299 do not necessarily fall within s 300. The first part of s 304 of the Penal Code covers cases which by reason of the exceptions are taken out of the purview of s 300, cll (1), (2) and (3) but otherwise would fall within it and also cases which fall within the second part of s 299, but not within s 300, cll (2) and (3). The second part of s 304 of the Penal Code covers cases falling within the third part of s 299 not falling within s 300, cl (4).

[17] For completeness, ss 299–300 (sans illustrations and explanation notes) define culpable homicide and murder as follows:

299 Culpable Homicide

A Whoever causes death by doing an act with the intention of causing death, or with the intention of causing such bodily injury as is likely to cause death, or with knowledge that he is likely by such act to cause death, commits the offence of culpable homicide.

300 Murder

B Except in the cases hereinafter excepted, culpable homicide is murder —

(a) if the act by which the death is caused is done with the intention of causing death;

C (b) if it is done with the intention of causing such bodily injury as the offender knows to be likely to cause the death of the person to whom the harm is caused;

(c) if it is done with the intention of causing bodily harm to any person, and the bodily injury intended to be inflicted is sufficient in the ordinary course of nature to cause death; or

D (d) if the person committing the act knows that it is so imminently dangerous that it must in all probability cause death, or such bodily injury as is likely to cause death, and commits such act without any excuse for incurring the risk of causing death, or such injury as aforesaid.

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[18] According to the post-mortem pathologist's report, there were altogether 19 incised wounds on the deceased though none of them were fatal wounds. The post-mortem report only stated that the cause of death was 'multiple incised wounds'. In view of the nature of the injuries sustained by the F deceased and the time and place of the incident, there was evidence of an intention on the part of the appellant to cause bodily injury to the deceased. In the light of such evidence, we think that it is important for the trial judge to appreciate the distinction between the definitions of culpable homicide and murder under ss 299–300 of the Penal Code before arriving at his decision on G the offence of which the appellant should have been convicted.

[19] In the particular circumstances of this case, the important question to be determined was whether the appellant intended to cause such bodily injuries as he knew likely to cause death or such as is sufficient in the ordinary course of H nature to cause death. Unfortunately, in the present case, the critical question remains unanswered; in our view, PW4 the forensic pathologist should have been asked to give his opinion on the nature of the injuries and its likely and natural effects, but he was not asked any questions on this crucial point. Accordingly, the evidence in this respect is wanting. As there is no evidence on I the nature of the injuries and its likely and natural effects, then the offence of which the appellant should have been convicted is culpable homicide for causing such bodily injury as is likely to cause death and not murder. Accordingly, we set aside the conviction for murder, and substitute it with one under limb (a) of s 304 of the Penal Code.

[20] We take this occasion to stress in passing that the outcome of a prosecution on a charge for murder does not turn solely on the testimony of the forensic pathologist. The forensic pathologist does not carry the burden of the case. His testimony is a factual and objective presentation of his autopsy findings and his opinions on the correlation of the autopsy findings with other case information. Even though he is called by the prosecution to testify, he is first and foremost an expert witness who should be impartial, objective and independent. In the final analysis, whether the appellant intended to cause such bodily injuries as he knew likely to cause death or such as is sufficient in the ordinary course of nature to cause death so as to constitute the offence of murder, are questions which should have been asked of the forensic pathologist by the learned DPP during the trial.

[21] After hearing of submissions on sentencing, we imposed a sentence of 15 years imprisonment to take effect from the date of his arrest.

Order accordingly.

Reported by Ashok Kumar